APPENDIX C

Transcript of Proceedings October 16, 1967

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 67-316.

ELLINGSON TIMBER COMPANY, *Plaintiff*,

vs.

GREAT NORTHERN RAILWAY COMPANY, a corporation, and WESTERN PACIFIC RAILROAD COMPANY, *Defendants*.

Portland, Oregon

October 16, 1967

TRANSCRIPT OF PROCEEDINGS

BEFORE: The Honorable Gus J. Solomon, Chief Judge.

[Tr. 1] The Court: We will take up the Ellingson Timber Company case. How many interrogatories have you objected to?

Mr. Cory: I think about 56, your Honor, or 57. I have answered six of them that I thought related to jurisdiction.

The Court: Have you tried to get together with him and see which ones you could agree on?

Mr. Cory: Well, I think that all the rest of these, your Honor, relate to a great mass of very very intricate facts. With respect to some of them, they relate to the 10-year periods—7-year periods at the limit. But, of course, my point was, your Honor, in making the objection, unless we knew whether this Court had jurisdiction over the subject matter, it would be most harassing to require the defendant to answer the very very intricate long interrogatories. I think it is vexation anyway. It would take literally months to file accurate answers, I am afraid.

The Court: Mr. Tilbury, I have looked at some of these; I just cannot see the relevancy of some of them. For example, look at (12) (a) "In what locations in the Pacific Northwest does defendant share trackage with other carriers? (b) With which other carriers are they shared (in each instance)?"

How is that going to prove or disprove any issue with respect to the two issues before the Court?

[Tr. 2] Mr. Tilbury: Your Honor, I will try to be brief. The contention of the defendant, as I understand it, is this is a segregated issue, and because the Interstate Commerce Commission made a decision under the Interstate Commerce Act in 1960, as a result of this complaint that was lodged in 1958, therefore, the Interstate Commerce Commission controls everything irrespective of anything outside of that decision that may have occurred at a subsequent time. We are not trying to attack the Interstate Commerce Commission's decision. We are saying there were acts starting in 1963, which were in clear-cut violation of the Sherman Act. At that time, they attempted and eventually succeeded in forcing our client out of business.

The Court: That is not what I submitted on the segregated issue. I segregated the issue of whether the statute of limitation had run. I also segregated for trial the issue of whether an action may lie in antitrust in an industry regulated by the Interstate Commerce Commission. Those were the only two issues. How are any of the questions you asked applicable to those issues?

Mr. Tilbury: Well, I understood that the issue was whether the decision by the Interstate Commerce Commission in 1960 controlled and precluded us from bringing an action before this Court arising out of the Antitrust for an action that occurred subsequent to that time. This, I thought, was [Tr. 3] the issue your Honor separated and not the other issues, because the issue that you present could be answered quite easily; I concede that. But, if we are limited to that single issue, of course, I would concede

we are in somewhat of a different posture than we otherwise would be.

The Court: Mr. Cory, is that what I held? This has been a couple of months ago.

Mr. Cory: Well if your Honor please, the question, I think, was brought up by Mr. Cosgrave. I thought there was a very serious issue as to whether this Court has jurisdiction over the subject matter. Now, it does go to the proceedings before the Interstate Commerce Commission that started in 1957 and were concluded in 1960.

The plaintiff's deposition was taken, which lasted for a full day. It's on file in this case. This will be part of our record on the segregated pretrial. The plaintiff's deposition clearly shows that every complaint—every so-called antitrust complaint that he makes in this case are the same Interstate Commerce Commission Act violation which he complained of to the Interstate Commerce and tried to recover $200,000.

The Court: You are not answering the question. I want to know from you the issue that you think is before me. I thought you said the principal issue would be the statute of limitation and the question of the Court's jurisdiction over [Tr. 4] a regulated industry. Is that true or not?

Mr. Cory: Well, the Court's jurisdiction over a regulated industry is not a question of law in a vacuum. It is—it has to be looked at in the contention of the particular complaint for treble damages. You can't sue an interstate carrier if he tries to drive you out of business and coerces you into conspiracy with another interstate carrier. That could be conceded. But, here, every complaint, these log rates and this holdback—these holdbacks of $30 a car and this preference and these discriminatory practices that he has tried to recover treble damage on, these acts were the acts that were decided by the Interstate Commerce Commission to be lawful and nondiscriminatory.

The Court: What is your point?

Mr. Cory: Well, my point is that that can be determined, I believe on a segregated pretrial which we have done a lot

of work on, incidentally. We have presented our draft of pretrial order to Mr. Tilbury. He has come back with some suggestions for changes with his own contentions. Perhaps, it would be clearer to your Honor if you read this first draft or look at the first draft of the pretrial order.

The Court: First I would like to find out what the issue is. I don't have to determine at this posture of the case whether this evidence is admissible. I just have to [Tr. 5] find out whether this information may lead to relevant testimony.

Mr. Cory: We are looking at this preliminary issue of jurisdiction over the subject matter, I believe. These preliminary issues that the Court segregated for separate trial, and I might say, we have just started off and have done a lot of work on the first issue of jurisdiction over the subject matter. We have done no work on this second issue of statute of limitation. I don't know if that could be disposed of also. But, we believe we have gotten down to working on that matter. I think it would be best for the Court and for the parties, in the meantime, to limit the first pretrial order to the question of the Court's jurisdiction over the subject matter that we are working with here.

But, I would say on the objections to interrogatories, none of these objections to interrogatories turned on the jurisdiction of the Court over the subject matter.

The Court: I cannot go behind the decision of the Interstate Commerce Commission to say that decision was incorrect, can I?

Mr. Cory: Mr. Tilbury would concede that.

Mr. Tilbury: We concede that.

Mr. Cory: That, in effect, is res judicata. We are not trying anything that has been tried before the ICC. We [Tr. 6] say plaintiff's deposition—Mr. Ellingson's deposition, which lasted all day and was 150 pages, shows everything that Mr. Ellingson and his cost complaint of this treble damage proceedings were adjudicated; all these charges were adjudicated to be lawful and nondiscriminatory in the Interstate Commerce proceedings. Under the Keogh case, we rely on Justice Brandeis' decision in *Keogh*

v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156. That shows a situation where a treble-action suit was filed in which the plaintiff tried to say the alleged damages resulted from a combination to fix rates in restraint of interstate commerce. The Court said if a shipper could recover under Section 7 of the Antitrust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might operate to give him a preference over his trade competitors. In other words, it would be discriminatory and preferential in favor of the plaintiff, because he can get treble damages whereas nobody else could. They are limited by the Interstate Commerce Act.

The Court: Let me hear from Mr. Cosgrave.

Mr. Cosgrave: Your Honor, as I stated, I am not directly involved in this phase. But, I am involved in the segregation of issues. Your Honor asked what it was that you had segregated. I think I could say that your Honor said [Tr. 7] to Mr. Tilbury at the time this first came up: Can you bring a Sherman case against a regulated industry? We say, no, he cannot. He cannot for a number of reasons. We say we felt there was a question of jurisdiction of the Court over the subject matter that arose, because it is a regulated industry. The Interstate Commerce Act permits it to arrive at charges and freight rates which might otherwise be subject to examination under the Sherman Act, but which are not.

Your Honor referred to the ICC proceedings that occurred before. We think that provides another reason why this Court does not have jurisdiction over the subject matter.

Now, on those issues——

The Court: To what proceeding are you referring?

Mr. Cosgrave: Pardon me, sir?

The Court: You were talking about the proceedings before the ICC.

Mr. Cosgrave: The proceedings before the ICC, we say, on the basis of Mr. Ellingson's deposition, which has been

taken, embodied and presented to the Commission, the exact complaint that he makes here about these two rates were made.

The Court: Why can't Mr. Tilbury ask about those proceedings before the ICC in his interrogatories?

Mr. Cosgrave: Your Honor, in the first place, all of this was before the Interstate Commerce Commission. All [Tr. 8] these issues were determined and decided by the Interstate Commerce Commission. Now, they say they have a cause of action that is based on what occurred in the last four years.

To give your Honor an example of what their position will be, in a draft of his contentions, Mr. Tilbury says under No. 3:

"The decision of the Interstate Commerce Commission could, under no circumstances, be determinative of the issues presented in this case, which relates to a different period of time, to different legal issues, and which presents additional facts."

We say that although he says that in this piece of paper, we have taken Mr. Ellingson's deposition and we have looked at his complaint, and, it's all the things that were involved in that prior proceedings which has been determined and was subject to determination by the ICC.

The Court: I have been looking at these interrogatories. I cannot understand how an interrogatory which says, what do you mean by a mixed car and various other things like that, have any relevancy to any of the issues involved in this case.

Mr. Tilbury: Your Honor, may I respond briefly?

The Court: Yes.

Mr. Tilbury: First, I would like to dispose of a [Tr. 9] number of statements that have been made, if I might.

We are not trying to retry the issues before the Interstate Commerce Commission. Whatever was tried and decided by the Interstate Commerce Commission, we would accept those things. We are saying this, your Honor: We

have never been allowed discovery at the Interstate Commission or up to now in this case. They are attempting to say: "Mr. Ellingson, you are limited absolutely to everything you knew at the time that you testified in our office under deposition." We feel certainly that we are entitled to find out the facts in the possession of the defendants. Now, this is what they are objecting to.

The Court: Mr. Tilbury, the reason why you have so much difficulty is you don't make yourself clear. You never set out clearly and succinctly what you are trying to do. You are always outside the record.

Mr. Tilbury: All right, your Honor, that's my fault. Please don't hold it against my client.

The Court: If you would set out clearly and succinctly precisely what you need, then a court would be able to do something for you. But here you put in 61 interrogatories and many of them have no relevancy at all to any of the issues in the case.

Mr. Tilbury: Your Honor, in order to answer the question: Was my client discriminated against, you have to [Tr. 10] know whether he was charged a different rate than somebody else. It's necessary to consider at least these factors. For example, you have to first know——

The Court: Do you know those factors?

Mr. Tilbury: No, sir, they have the information.

The Court: How could you bring an action for antitrust violation when you did not know the facts?

Mr. Tilbury: Your Honor, most of these facts are within their knowledge.

The Court: You mean you are just bringing this action on suspicion and surmise; is that what you are telling me?

Mr. Tilbury: No, sir. I am asking in good faith, and so is my client. We don't have personal knowledge of this. We don't have all the facts that are available to the defendants. Unfortunately, they have the information. In most cases, they know what agreements they made; they know how they classified these things. I am asking, for example, for information dealing with their tariff structure in order to know

the answers to the questions asked in No. 14. This is a very intricate case. Now your Honor feels I am not being briefed enough. I wish I could be more brief.

Your Honor, it would be simple if I could ask them directly. It is necessary to make a comparison of all these factors in order to arrive at the final result. And, it's [Tr. 11] in the nature of the antitrust cases to be somewhat complicated. It would be very easy if we were trying a personal injury case, and I could make four requests. Unfortunately, this is not the nature of this case.

I have a brief that I have tendered, your Honor, dealing with the scope of the interrogatories.

The Court: I will take a look at your brief and then make a determination.

Mr. Cory: I would like to make one point. Mr. Tilbury says this would require looking at these factors to determine whether a particular rate charged to his client was discriminatory or nondiscriminatory. That is the very rate that has been determined by the Interstate Commerce Commission to be lawful and not discriminatory and not preferential.

Mr. Tilbury: In the first place, that is the rate, in 1960, that was presented to the Interstate Commerce Commission. As a matter of fact, that did not exonerate the railroad insofar as the cutback rates on logs to outbound lumber shipments. So, it isn't the simple issue that my opponent would present.

Mr. Cosgrave: The last matter on the cutback, that was conceded by the defendants in that proceeding.

Your Honor, when we first stood up here earlier and you had us to wait, I think you put your finger on it when you said to Mr. Tilbury: "What are you claiming in this [Tr. 12] case?" That is what the defendants would like to know in connection with this pretrial that we are working on. What do they claim that these defendants did in the last four years. Of course, that would relate to these interrogatories. It isn't sufficient to say it involves different periods of time and different legal issues.

The Court: Perhaps Mr. Tilbury could do that right now. What are you claiming in this case?

Mr. Tilbury: We are claiming, your Honor, there was a violation——

The Court: I don't want this gobbledygook. Tell me specifically what they did that they should not have done.

Mr. Tilbury: All right. Specifically, your Honor, eliminating a lot of other material, we are saying: Number one, they attempted to restrict our business and preclude us from making a go in the industry.

The Court: How?

Mr. Tilbury: They charged us such a prohibitive rate, it was impossible for us to economically ship our products to California.

The Court: Your number one is that they charged you a great deal more than they did comparable shippers.

Mr. Tilbury: Yes, sir. This is continuous.

The Court: This was for the purpose of driving you out of business with a rate higher than those charged to [Tr. 13] comparable shippers.

Mr. Tilbury: Yes, sir.

The Court: What is your next one?

Mr. Tilbury: There was a systematic attempt to get us out of business by the fact they made it economically unprofitable.

The Court: Tell me how they did it in plain simple English.

Mr. Tilbury: All right. Among other things, they imposed a $30 a car penalty charge on us for each car unless we agreed to ship all of our products east into the transcontinental tariff areas which would be east of Denver. This is one thing, among many other factors.

The Court: Tell me the other factors.

Mr. Tilbury: Many of these, your Honor, without going into all details, we would like to find out from the opposition—at this time they are denying our right to discover these factors. They know for example, what they have charged to other shippers. We know what we were charged.

But, we cannot look behind their records to find out how they treated others of our competitors. There are other lumber companies in Southern Oregon, and at least one of which we believe the railroad has a substantial interest. We believe they probably gave that other lumber company, among other things, tax breaks and many other advantages not [Tr. 14] extended to Mr. Ellingson and his lumber company. But these are things, your Honor, which require evaluation of many factors. I am sorry I haven't made it as clear apparently as I should.

I have, by the way, the transcript that was presented. Your Honor, I tried to follow your language. This was in July—August, rather. You indicated at that time: We are going to have a trial on the statute of limitation. We will have a trial on the issue of whether these acts were within the jurisdiction of the Interstate Commerce Commission. We will have a number of these other issues which we can try in advance of the main case.

I interpreted that to mean—perhaps I am not interpreting it correctly; but this requires an understanding primarily on what has taken place in the past and the fact it was limited to a particular period. There were particular charges made. We are saying there are other things that have happened.

The Court: What other things?

Mr. Tilbury: I have mentioned some of these things, your Honor. We feel there was a system on the part of the railroad to drive us out of business by the application of the excessive tax rate plus the privileges extended to our competitors and not extended to us such as various railroad facilities, dumping privileges, profit sharing agreements and [Tr. 15] a number of other factors which we think will come to light if your Honor allows us to proceed with the interrogatories.

The Court: Why don't you take these interrogatories back and file new interrogatories in clear understandable and succinctly language. Set out exactly what you want in not more than 15 interrogatories in the first instance. Then

if these are relevant, you can subsequently apply for more and I will give them to you.

Mr. Tilbury: All right.

The Court: I want to know what you are trying to do.

Mr. Tilbury: All right.

The Court: If I find that you have asked for relevant information and that you need more information, I will give you an additional 15 interrogatories.

I think you had better analyze your problem. I will give you two weeks within which to do it.

Mr. Cosgrave: I made a list here of what Mr. Tilbury says he is claiming. One is the prohibitive rate which was higher to them than other shippers. That, we assume, is the rate that was involved in the other proceeding. Then he says the $30 cutback. That was involved in that proceeding also. Then, the tax rate to other mills, that doesn't involve the defendant Western Pacific Railroad. It just seems to me we could narrow this further discovery down, your Honor, by having him say: This is what I claim you did [Tr. 16] within the last four years which is the relevant period that is involved. I guess that is what he is saying we did. Maybe we can go on and try to work out the pretrial order and the interrogatories.

Mr. Tilbury: Yes.

The Court: Mr. Tilbury, is much of this information which you are seeking in the transcript of the testimony before the Interstate Commerce Commission?

Mr. Tilbury: No, sir; unfortunately, it deals with the lease of one of the lumber companies. Then they recessed. We still do not know what is contained in the lease.

The Court: What did the Interstate Commerce Commission do after Mr. Ellingson testified?

Mr. Tilbury: Well, they held one of the actions of the railroad to be legal; they held another action of the railroad to be illegal. Specifically, they found that the cutback they charged us of $30 more per car, they said you could get the $30 back in the event that Mr. Ellingson were to ship all of his products east of Denver.

The Court: You mean the Interstate Commerce found that restriction to be illegal?

Mr. Tilbury: Yes.

The Court: Then, you are in pretty good shape. Why do you need any more information from them on that?

Mr. Tilbury: Your Honor, we do not feel it stops at [Tr. 17] that point. Mr. Ellingson was compelled to sell his entire mill in 1963 as a result of a number of actions on the part of the defendants. We would like to know precisely all of the factors that brought this about.

The Court: You file your 15 interrogatories; then I will take a look at them.

Mr. Tilbury: All right, your Honor.